IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 49 of 2003

in

MISC.CIVIL APPLICATIONNo 167 of 2003

with

CIVIL APPLICATION No 179 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ABHISHEK SHOPS & WAREHOUSE CO-OP. SOC. LTD.

Versus

MONALI TEXTILE

Appearance:

1. O.J.APPEAL No. 49 of 2003

MR MIHIR JOSHI FOR PARITOSH CALLA for Petitioner No. 1

MR. S.N. SOPARKIAR FOR M/S TRIVEDI & GUPTA for Respondent No. 1

OFFICIAL LIQUIDATOR for Respondent No. 2

NOTICE SERVED BY DS for Respondent No. 3,7
MR ANIP A GANDHI for Respondent No. 4
SINGHI & CO for Respondent No. 5
MR DS VASAVADA for Respondent No. 6
MR AV TRIVEDI for Respondent No. 8

2. CIVIL APPLICATION No. 179 of 2003
MR PARITOSH CALLA for Petitioner No. 1
..... for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE N.G.NANDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 24/12/2003

CAV JUDGEMENT

(Per : HON'BLE MR.JUSTICE N.G.NANDI)

1. This Appeal under section 483 of the Companies Act, 1956 (hereinafter referred to as the 'Act") is directed against the order dated 16.10.2003 passed in Misc. Civil Application No.167 of 2003 by the Learned Company Judge fixing fresh auction, recalling / reviewing the order dated 11.9.2003 passed in Company Application No.311 of 2003 in Company Application No.210 of 2003.

2. The facts giving rise to the present appeal shortly stated are that for the sale of immovable properties viz. lands of Dariapur Unit No.2 of New Gujarat Synthetics Ltd. (in liquidation), a sale committee was constituted under the Chairmanship of respondent no.4 (I.I.B.I.). Before the sale committee the appellant, respondent no.1, and respondent no.8 gave their respective offer; that before the sale committee, appellant deposited Rs.40-00 lacs as E.M.D. and participated in the auction whereas Respondent No.1 gave offer of Rs.75,00,000/- and raised it to Rs.3,76,00,000/. The property was valued by the approved valuer in January 1998 at Rs.3,88,00,000/-; that in the Court auction the appellant gave highest bid of Rs.4,05,00,000/-. Respondent No.1 did not participate in Court auction. Whereas Mahavir Developers (respondent no.8) gave bid of Rs.3,86,00,000/-. By the order dated 11.9.2003 Company Judge accepted the offer made by Arvindbhai Kantibhai Patel promoter / organizer of proposed society for Rs.4.05,00,000/- and confirmed the sale accordingly in favour of the proposed society, subject to registration with Registrar of Societies and on further terms and conditions mentioned in the said order.

After confirmation of sale in favour of the proposed society, present respondent no.1 on 19-9-2003 moved an application being O.J.M.C.A. No.167 of 2003 praying for recall / review of the order dated 11.9.2003 accepting highest bid of Rs.4,05,00,000/- and confirming the sale as above, contending that because of some financial constraints the applicant could not bid or put any offer either before the committee or before the Court; that the applicant has now arranged the finance and applicant is ready to deposit an amount of Rs.40 lacs towards E.M.D. without any interest thereon; that the applicant is ready to pay minimum price of Rs.4.15 crores as against Rs.4.05 crores; that the sale should be confirmed in favour of the applicant by reviewing / modifying the order dated 11.9.2003. The Company Judge vide order dated 16-10-2003 recalled/reviewed the order dated 11-9-2003 and directed fresh auction fixed on 12-11-2003. It is this order dated 16-10-2003 directing fresh auction of the properties (lands) of New Gujarat Synthetic Mills Ltd (in liquidation) which is assailed in this appeal by the appellant Society registered subsequent to the order dated 11-9-2003 as the Society.

3. It may be noted that vide order dated 11.9.2003 Company Court accepted the bid and confirmed the sale in favour of appellant Abhishek Shops & Warehouse Co. Operative Society Ltd. (proposed), subject to its registration with Registrar of Co-operative Societies. After order dated 11.9.2003 proposed Society has been registered with Registrar of Co-operative Societies.

We have heard and carefully considered the submissions advanced by Mr. Mihir Joshi, learned advocate for the appellant, Mr. S.N. Soparkar, learned senior counsel for Respondent No.1, Mr. A.A. Gandhi, learned advocate for Respondent No.4, M/s. Singhi & Co., learned advocate for Respondent no.5, Mr. D.S. Vasawada, learned advocate for Respondent No.6 and Mr. A.V. Trivedi, learned advocate for Respondent No. 8.

4. [4.1]: On behalf of the appellant reliance is placed on the decision in the case of M/s. NAVALKHA AND SONS VS. SRI RAMANYA DAS AND OTHERS, 1969(3) SCC, pg. 537, wherein it is held that the property does not vest in auction purchaser unless the sale is confirmed by the Court. Before confirmation the Court must satisfy itself that the price fetched is reasonable. Sale confirmed without being so satisfied, the exercise and jurisdiction is not proper.

After referring to the case of A. Subharaya Mudaliar Vs. K. Soudarajan, the Apex Court observed that the the condition of confirmation by the Court being a safeguard against the property being sold at an inadequate price, it will be not only proper but necessary that the Court in exercising the discretion which it undoubtedly has of accepting or refusing the highest bid at the auction held in pursuance of its orders, should se that the price fetched at the auction is an adequate price even though there is no suggestion of irregularity or fraud.

4.2: In a later decision in the case of M/S. KAYJAY INDUSTRIES (P) LTD VS. M/S. ASNEW DRUMS (P) LTD AND OTHERS, (1974) 2 SCC pg. 213, 3 Bench Judges of the Hon'ble Apex Court following the principle enunciated in the case of M/s. Navalkha & Sons (supra) while dealing with Order 21, Rule 90 of CPC held that, "A Court sale is a forced sale and, notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The Judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variation within limits between such an estimate, however careful, and real bids by seasoned businessman before the auctioneer are quite on the cards. Businessman makes uncanny calculations before striking a bargain and that circumstance must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. It is further held that, 'if Court sales are too frequently adjourned with a view to obtaining a still higher price it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through..... What is expected of the judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that in the given circumstances, the bid is acceptable, conclude the sale..... The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible.

Otherwise, a new threat to certainty of Court sale will be introduced."

4.3: In the case of DIVYA MANUFACTURING COMPANY (P) LTD & ORS. VS. UNION BANK OF INDIA AND ORS, (2000) 6 SCC, pg. 69, considering the fact that the highest bid made by a party was accepted and confirmed by the High Court but before the delivery of possession and execution of sale deed certain other parties offering much higher price, and High Court requiring them to deposit 20 per cent of the amount of their offer and to pay a certain amount each to the party whose bid has been accepted; the Apex Court after referring to the decision in M/s. Navalkha And Sons (supra) held that, High Court's order setting aside the confirmation of the past highest bid was within the discretion of the High Court even though there was no suggestion of irregularity or fraud. More so when a provision in the terms and conditions of sale empowered the High Court to do so and the High Court exercised that power within a short time. In para-11 it has been observed that the application for setting aside the sale was filed within a few days of the order accepting the bid of the appellant. In this set of circumstances, when correct market value of the assets was not properly known to the Court and the sale was confirmed at a grossly inadequate price, it was open to the Court to set it at naught in the interest of the Company, its secured and unsecured creditors and its employees.

In para-16 it has been observed that, there is a specific Condition 11 in the terms and conditions of sale empowering the Court to set aside the sale even though it is confirmed for the interests of creditors, contributories and all concerned and/or public interest. Thus, Condition-11 in the terms & condition of sale was an additional factor and not the only factor while confirming High Court order setting aside the confirmation of past highest bid, which was held within the discretion of the High Court.

It may be seen that, in the instant case the valuation of the property by the approved valuer in January 1998 is Rs.3,86,00,000/-. In June 1999 ULC Act came to be repealed. On the basis of the valuation of January 1998 the highest bid of Rs.4,05,00,000/- came to be accepted and sale confirmed in favour of the proposed Society. The market value of the property around the time sale came to be confirmed cannot be said to be known to the Court and Respondent No.1 coming with a substantial higher offer by Rs.45-00 lacs within few days

of sale confirmation. In the instant case neither the possession of the property is given to the appellant nor the document of sale is executed.

4.4: In the case of SHRAWANKUMAR AGARWAL V. SHRINENP INVESTMENT LTD AND OTHERS (1990) 2 Comp LJ (Cal) pg. 231, the Division Bench of the Calcutta High Court held that the order under appeal, accepting the offer and confirming the sale in favour of the first respondent is discretionary in nature. The Appellate Court would not be normally justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to a different conclusion. If, however, the exercise of discretion by the Trial Court is in law wrongful and improper, that is, in exercising the discretion, the trial Court has adopted an unjudicial approach or proceeded on wrong principles, then it would be open to the Appellate Court to interfere with such exercise of discretion. The same considerations must weigh also in judging the order under appeal by which the Court in its discretion rejected the prayer for de-confirming the sale made in favour of the first respondent and for ordering a fresh sale.

In the instant case re-bidding directed by the Learned Single Judge is not only on account of higher offer given by Respondent no.1, which one of the factors besides the other factors pointed out above, namely the real market value of the property soon before the confirmation of sale was not known to the Court.

4.5: In the case of LICA (P) LTD (NO. 1) V. OFFICIAL LIQUIDATOR AND ANOTHER, 85 COMPANY CASES, PG. 788 , referring to M/s. Navalkha And Sons (supra) and M/s. Kayjay rums (P) Ltd. And Others (supra) held that, allowing the appeal, that the purpose of an open auction is to get the most remunerative price. It is the duty of the Court to keep the auction open so that intending bidders would be free to participate and offer higher prices. If that path were closed, the possibility of fraud or under-bidding would loom large. The Court would, therefore, have to exercise its discretion wisely and with circumspection and keeping in view the facts and circumstances in each case..... The sale conducted was subject to confirmation. Therefore, mere acceptance of the offer of S did not constitute any finality, nor would the auction be automatically confirmed. The appellant had offered an even higher price at Rs.45,00,000. Keeping in view the interest of the company and the creditors and the workmen to whom the

sale proceeds would be applied, the company Judge was right in exercising her discretion to reopen the auction and directing S as well to make higher offers than that offered by the appellant.

In LICA (P) LTD (NO. 2) V. OFFICIAL LIQUIDATOR AND ANOTHER, 85 COMPANY CASES, Pg. 792, it has been held by the Apex Court that, proper control of the proceedings and meaningful intervention by the court would prevent the formation of a syndicate, under bidding and the resultant sale of property for inadequate prices. The order passed by the Court yielded the result that the property which would have been finalised at Rs.45 lakhs, fetched Rs.1.10 crores and a further offer of Rs.1.25 crores had been made. In other words, the property under sale was capable of fetching a higher market price. Accordingly, there was to be a fresh auction, this time not restricted to the two parties, and the upset price was to be fixed at Rs.1.50 crores."

In the instant case the sale in favour of the appellant was confirmed at Rs.4,05,00,000/-, Respondent no.1 offered Rs.4,50,00,000/-. Thus the upset price is now Rs.4,50,00,000/-. Respondent no. 8 has offered a price of Rs.4,55,00,000/- to the Sale Committee after passing of the impugned order.

5. One of the arguments advanced by Mr. Joshi is that in the impugned order it is not observed that the price fetched is inadequate nor the sale is vitiated by fraud or irregularity and that, mere higher offer after confirmation of sale would be no ground to disturb the sale, and the same ought to be confirmed. This argument at the first blush appears attractive but if the same is examined carefully in light of judicial pronouncements as above, what is suggested is otherwise.

6. It is true that Learned Single Judge has not observed that the price of Rs.4,05,00,000/at which the sale in favour of the proposed society is confirmed is inadequate. This argument needs to be examined in light of the legal position and the facts and attending circumstances. It is not in dispute that the valuation of the property in question was done on 29-1-1998 and the valuation arrived at was Rs.3,88,00,000/-. It is also observed in the impugned order that "if the fact of repeal of Urban Land Ceiling Act applicable to the area where the property is located been brought to the notice of the Court, then, probably revaluation of the property under sale could have been ordered." It cannot be denied that the repeal of the Urban Land Ceiling Act may have

the effect of augmenting the price of the open land in urban areas where the Act was in force. It is also observed by Learned Company Judge that the valuation report was taken into consideration and that it was on wrong basis that the sale in favour of the proposed society came to be confirmed. The sale in favour of the proposed society has been confirmed by order dated 11-9-2003. Respondent No.1 subsequently came with an application on 19-9-2003, i.e. within less than ten days of the confirmation of sale in favour of proposed Society with a request to recall/review the order dated 11-9-2003 whereby the sale in favour of the proposed society came to be confirmed and in the said application respondent no.1 has given offer of higher price. The very fact that within lessthan ten days of order dated 11-9-2003 respondent no.1 gave higher offer of Rs.4,50,00,000/- is suggestive of the property capable of fetching higher price. Now considering all these facts together, namely valuation report of January 1998, repeal of Urban Land Ceiling Act in June 1999 and offer of Rs.4,50,00,000/within less than ten days suggesting increase of Rs.45,00,000/- would be suggestive of the fact that Rs.4,05,00,000/- offered by the proposed society would not be the real market price of the land in question at or around 11-9-2003. It may also be realised that the difference of Rs.45-00 lacs cannot be said to be marginal but it is a substantial difference. It may also be seen that Company Judge, though not in so many words, has sufficiently indicated in the impugned order that the property would fetch more price than Rs.4,05,00,000/- and the same is not the real market price or near to the real market price at the relevant point of time. Taking all these into consideration in the impugned order reauction has been directed keeping in mind that the property can fetch more price than at which the sale in favour of the proposed society was confirmed. The price fetched is found to be "inadequate" in light of the valuation report of January 1998, the proposed Society being the highest bidder, and the offer of Rs.4,05,00,000/found not reflecting real market price. It may also be seen that while fixing the market price of the property under acquisition in the proceeding under Land Acquisition Act, 10 % increase per year in the market price is recognised in law for determination of the market price of the property acquired by notification subsequent in point of time. Keeping that principle in mind the valuation report of June 1998 suggesting the market value of the land in question at Rs.3,88,00,000/- and 10 % increase per year till 11-9-2003 when the sale came to be confirmed in favour of the proposed society, the market price of the land in question would be far more than

Rs.4,05,00,000/- offered by the proposed society.

7. Thus in light the above price fetched by the property/land in question has to be considered adequate or not. The impugned order as observed above has indirectly suggested that the price fetched is inadequate while observing that the property could have fetched more price and that the Company Court could have ordered for revaluation of the property under the sale. In our opinion this is sufficient to indicate whether the price fetched in the auction can be said to be adequate. We are in agreement with the observation in the impugned order that the property under sale could have fetched more price than Rs.4,05,00,000/-. It need hardly be said that the effort of the Company Court has to be in the direction of obtaining the maximum price of the property in the auction for the benefit of workers, secured, unsecured creditors and the company, and the entire class of creditors would stand to benefit by the higher price received by the property under the sale.

8. It has been submitted by Mr. Joshi that there should not be frequent interference with the confirmation of sale by Court auction as the same may prove self defeating as the person interested in purchasing the property may lose faith in Court auction for the reason of uncertainty in it. This proposition can not be disputed even for a moment and we also agree that the mere higher offer would be no reason to upset the confirmation of sale. It may be seen that the legal position in this regard makes frequent interference with Court sale impermissible but the interference with Court sale if found necessary in the interest of company would be permissible. Thus the interference with Court sale is not totally impermissible. In the instant case there is no question of frequently disturbing confirmation of sale for the simple reason that respondent No. 1 came forward with an application dated 19-9-2003 for review/recall of the order dated 11-9-2003. The difference is substantial and one does not know at the reauction what price the property in question would fetch. It would certainly be not below Rs.4,50,00,000/as Respondent no. 8 Mahavir Developers have given the offer of Rs.4,55,00,000/- to the sale committee. Since the applicant has given the application within less than ten days of confirmation of sale, possession of the property yet not given to the appellant nor sale deed executed and the difference being substantial and respondent no. 1 having given undertaking for the offer of Rs.4,50,00,000/-, and also bearing in mind that respondent no. 8 having offered Rs.50,00,000/- more than the appellant; it is not merely

higher offer given by respondent no.1 which weighed with the Company Court in directing reauction of the property, but found necessary in light of the circumstances pointed out above and that the property would have fetched more price and with that the order dated 11-9-2003 has been recalled. It is a settled legal position that the discretion exercised in directing reauction by the Company Court should not be interfered with unless the impugned order is wrong on principle. It may also be seen that respondent no.1 has given an undertaking to the Court that he would give minimum offer of Rs.4,50,00,000/- and as submitted by Mr. A.V. Trivedi learned advocate for respondent no.8, respondent no. 8 has offered Rs.4,55,00,00/- to the sale committee after passing of the impugned order. The directions in the impugned order sufficiently protect the interest of the appellant, now registered Society, no prejudice is caused to the appellant.

9. It is submitted by Mr. Soparkar for respondent no.1 that on 11-9-2003 the Society was not in existence and the confirmation of sale in favour of unregistered Society and its effect would be a question of law and can be agitated in the appeal without taking the same even in the Court below, and on such question of law the order which the lower Court should have passed could be passed by the Appellate Court under Order 41 Rule 33 of CPC. There can be no disagreement with this proposition of law. It is further submitted by Mr. Soparkar that confirmation of sale in favour of unregistered / proposed Society not being a juristic person, is a nullity and subsequent to registration of Society is of no consequence. In our opinion, there is no need to dwell on this point since we are inclined to uphold the order of learned Company Judge for the reasons aforestated and therefore, we leave this submission of Mr. Soparkar here only.

10. It, therefore follows, taking overall view of the matter, that the order dated 16-10-2003 directing reauction of the property in question does not call for any interference in this appeal, and the appeal deserves to be dismissed.

11. In the result appeal fails. Impugned order dated 16-10-2003 directing reauction of the property of the company (in liquidation) is upheld. No order as to costs.

12. In view of the order passed in main appeal, OJCA No. 179 of 2003 is dismissed. Ad-interim relief in

terms of para 6(B) granted vide order dated 7-11-2003 stands vacated. Rule discharged.

Dt:24-12-2003 (N.G. Nandi, J)

(D.P. Buch, J)

/vgn